

Attorney Docket No.: J6839(C)
Serial No.: 10/730,218
Filed: December 8, 2003
Confirmation No.: 4638

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Sir:

In response to the final rejection with a notification date of October 30, 2009, please enter the following Pre-Appeal Brief Request for Review on the above-identified application as follows. A Notice of Appeal is filed herewith. Because this Request is limited to five (5) pages, the arguments here do not represent all of Applicants' objections to the office action. Applicants reserve the right to raise additional arguments on appeal, including arguments not presented in this request. The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

Remarks/Arguments begin on page 2 of this paper.

REMARKS

Reconsideration and withdrawal of the examiner's rejections under 35 USC § 103(a) is respectfully requested in view of the following remarks. The applicant would like to thank the examiner for her time and kind cooperation in this matter.

Examiner's Response to Amendment

The examiner asserts that the amendment to the claims filed on August 8, 2008, does not comply with the requirements of 37 CFR 1.121(c) because the amended claim was not marked as to indicate what changes were made. In response, applicants respectfully submit that no claim amendments were made, only arguments.

35 USC § 112

The examiner has maintained the rejection of claims 1, 2-6, 9 and 11-16 under 103(a) as being unpatentable over Beerse, et al., (US Patent 6,294,186 B1). Applicants respectfully traverse this rejection.

The examiner discusses at length the myriad items disclosed by Beerse, et al., in the context of isolated components of a specific antimicrobial composition comprising a benzoic acid analog and a dermatologically acceptable carrier for the benzoic acid analog when complexed with metal wherein the composition has a pH of about 1-7 and is substantially free of a specific organic acid. Applicants respectfully submit that a proper prima facie case under § 103 is not been made out with respect to Beerse, et al., because Beerse at least does not disclose a specific example of a composition where at least two different components of the dispersed phase can react with each other when blended with water according to claim 1.

Assuming arguendo a proper prima facie case had been set out, the examiner further asserts that it would have been obvious at the time the invention was made for the skilled person to select specific isolated components, ostensibly with the benefit of hindsight of applicant's invention, and manipulate items so they are blended together between the continuous and dispersed phases according to the instant claim limitations. In response, applicants respectfully submit to the contrary that it would not have been obvious for the skilled person to do this because there is no teaching, suggestion or motivation in the art of record nor is such a combination predictable due to the complex physical and chemical interactions that could take place in a given hypothetical arrangement of reactive chemicals. (See KSR v. Teleflex, 127 S. Ct. 1727 (2007)).

The examiner asserts the following: Beerse, et al., teaches active ingredients can be metal salts (e.g., copper chloride = first component and benzoic acid = second component), which are both soluble actives such that one would reasonably expect that these active components would be present in the aqueous dispersed phase. Also, Beerse, et al., teach other actives, including cyclodextrins (e.g., uncomplexed cyclodextrin), which are also water soluble, which are also capable of reacting with one or more other components. Furthermore, Beerse, et al., suggest compositions combination of the active ingredients as evidenced by the examples teaching water-in-silicone compositions comprising a combination of benzoic acid and copper chloride (cols. 52-52, Examples 14-18). Hence, the cited art teaches all of the instant claimed limitations and is therefore capable of performing the intended function.

In response, applicants respectfully submit to the contrary that the skilled person would know that "chemically reacting" as required by the claims, i.e., a component capable of chemical reaction, involves electron transfer reactions such as bond breaking or redox reactions and do not include ionic equilibria such as the interaction of copper salts with benzoic acid nor that of cyclodextrin complexation via ionic and stereo chemical interactions. Therefore, the examiner's citation of numerous specific ionic and complexation interactions of Beerse, et al., which do not involve electron transfer, do not establish a prima facie case where "a first component is capable of chemically reacting with a second component" not to mention the further claim limitation that both components must reside in the dispersed phase.

The examiner has maintained the rejection of claims 4 and 5 under 103(a) as being unpatentable over Beerse, et al., (US Patent 6,294,186 B1), in view of Nakagaki, et al., (US Patent 6,451,327; already made of record by applicant 12/08/03). Applicants respectfully traverse this rejection.

Nakagaki, et al., relates to a substantially nonaqueous skin cleansing composition with granulated surfactants. Applicants respectfully submit that Nakagaki, et al., doesn't remedy the deficiencies of Beerse, et al., with respect to claims 4 and 5 which depend from claim 1.

The examiner has maintained the rejection of claim 12 under 103(a) as being unpatentable over Beerse, et al., (US Patent 6,294,186 B1), in view of Puvvada, et al., (US Patent 5,952,286). Applicants respectfully traverse this rejection.

Puvvada, et al., relates to lamellar phase compositions comprising defined surfactants and liquid crystalline phase structurants. Applicants respectfully submit that Puvvada, et al., doesn't remedy the deficiencies of Beerse, et al., with respect to claim 12 which depends from claim 1.

CONCLUSION

In light of the above remarks, applicants submit that the claims now pending in the present application are in condition for allowance. The examiner is invited to contact the undersigned if there are any questions concerning the case.

Respectfully submitted,

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